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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

CBSK FINANCIAL GROUP, INC. et al.,

Plaintiffs and Respondents,

v.

NOVASTAR MORTGAGE, INC. et al.,

Defendants and Appellants.

B173210

(Los Angeles County
Super. Ct. No. BC292616)

APPEAL from an order of the Superior Court of Los Angeles County, Soussan G. Bruguera, Judge. Affirmed.

Knee, Ross & Silverman, and Melanie C. Ross for Defendants and Appellants.

Mazda Butler, Mark N. Mazda, and Mark J. Butler for Plaintiffs and Respondents.

Defendants, NovaStar Home Mortgage, Inc. and NovaStar Mortgage, Inc., appeal from the denial of their special motion to strike the complaint of plaintiffs, CBSK Financial Group, Inc. doing business as American Home Loans (the lending company), Lori Pendray, and Dori Kay. We conclude plaintiffs' claims are not subject to a special motion to strike and affirm.

According to plaintiffs' complaint, the lending company operates a nationwide network of branch offices which originate, broker, and sell mortgage loans. Ms. Kay is a

vice president of the lending company. Ms. Pendray is the lending company's chief financial officer. The nationwide branch offices and their employees maintain contractual relationships with the lending company. Defendants, who are competitors of the lending company, operate a nationwide network of offices for the origination and sale of mortgage loans. Also, defendants are customers of the lending company.

Around August 2002, defendants began to spread false allegations about the lending company. The false allegations about the lending company spread by defendants included: 6 of the lending company's officers and 83 of its employees had been indicted; there was an ongoing investigation arising from the sending of "criminally fraudulent files" to the branch offices; the criminal conduct had caused "a lot" of the lending company's branches to affiliate with defendants; the lending company, which is in trouble criminally, is going to stop using branch offices to package mortgage loans; the lending company, with 30 criminal indictments, did not have "any valid controls" in place for its branch offices; defendants' branch office program was superior to that of the lending company; and defendants, who had a relationship with the lending company, no longer desired to do so. These false statements were made to the "public at large" and the lending company's employees, branch offices, officers, and customers. Defendants' purposes in spreading the false allegations were to: "steal" the lending company's branch offices, employees, officers, and customers; convince the lending company's employees to begin working for defendants; solicit the lending company's customers to use defendants for mortgage loan services; destroy the lending company's reputation and good will; weaken the lending company in the mortgage loan marketplace; destroy the reputations of the lending company's officers and employees; and destroy the lending company's business. Based on these allegations, plaintiffs asserted causes of action for interference with contractual relationships and economic advantage, defamation, and unfair competition within the meaning of Business and Professions Code section 17200 et seq.

Defendants filed a special motion to strike. Defendants' evidence indicated the following. Several individuals had been indicted. One of defendants' corporate officers

read about indictments of lending company employees on the internet and in an Associated Press news release. After the news of the indictments was received, defendants stopped accepting loans from the lending company. George Abernathy, a former branch manager employed by the lending company, changed his employment and began working for defendants. No derogatory statements about the lending company were made by defendants' employees to induce Mr. Abernathy to leave the lending company. Mr. Abernathy left the lending company because he wished to be involved in the funding and servicing of the "sub-prime" mortgage lending market. Another former lending company employee, Michael Miller, left after the indictments caused American Express to terminate its referral business. No disparaging remarks were made by defendants' employees to cause Mr. Miller to leave the lending company. There was also evidence of an exchange of correspondence between the attorneys for the parties. Plaintiffs presented evidence consistent with the complaint's allegations.

On December 3, 2003, the trial court denied defendants' special motion to strike and overruled the parties' evidentiary objections. Defendants filed a timely notice of appeal. After the record was filed, we noted that effective January 1, 2004, Code of Civil Procedure¹ section 425.17 became effective and it may be dispositive in terms of defendants' right to use the special motion to strike remedy. As a result, we issued an order to show cause concerning summary affirmance. (See Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2004) § 5:84, p. 5-25.) We directed the parties to brief this specific issue which was potentially dispositive and set the cause for oral argument.

Section 425.17 was effective January 1, 2004. (Stats. 2003, ch. 338, § 1; *Blanchard v. DIRECTTV, Inc.* (2004) 123 Cal.App.4th 903, 912, fn. 5.) Section 425.17 applies to cases on appeal which were decided in the trial court prior to its January 1, 2004, effective date. (*Northern California Carpenters Regional Council v. Warmington Hercules Associates* (Nov. 22, 2004, A105826) __ Cal.App.4th __, __; *Blanchard v.*

DIRECTTV, Inc., *supra*, 123 Cal.App.4th at p. 912, fn. 5; *Goldstein v. Ralphs Grocery Co.* (2004) 122 Cal.App.4th 229, 233; *Physicians Com. for Responsible Medicine v. Tyson Foods* (2004) 119 Cal.App.4th 120, 129-130; *Metcalf v. U-Haul International, Inc.* (2004) 118 Cal.App.4th 1261, 1266; *Brenton v. Metabolife Internat., Inc.* (2004) 116 Cal.App.4th 679, 687, 689-691; cf. *Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 815, fn. 5.) Section 425.17, subdivision (c) states in relevant part: “Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling . . . services, including, but not limited to . . . financial instruments, arising from any statement or conduct by that person if both of the following conditions exist: [¶] (1) The statement or conduct consists of representations of fact about that person’s or a business competitor’s business operations . . . or services, that is made for the purpose of obtaining approval for . . . commercial transactions in, the person’s . . . services [¶] (2) The intended audience is an actual or potential . . . customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer”

Section 425.17, subdivision (c) bars defendants in the present case from using the special motion to strike remedy. Plaintiffs are suing business competitors who are purportedly making false representations of fact. The false representations of fact are allegedly made in an effort to: induce the lending company’s employees to come work for defendants; have the lending company’s branch offices to affiliate with defendants; adversely affect the lending company’s goodwill; weaken the lending company’s market position; induce the lending company’s customers to use defendants for their mortgage needs; and destroy the ability of the lending company to service or procure mortgage loans. These allegations involve alleged representations in the marketplace which directly relate to commercial transactions between the lending company and defendants as well as third parties. This is sufficient to trigger the provisions of section 425.17, subdivision (c)(1). As to section 425.17, subdivision (c)(2), the intended audience is

¹ All future statutory references are to the Code of Civil Procedure.

likely to repeat the purportedly false allegations which are directed at actual or potential customers of the lending company. Since section 425.17, subdivision (c) is applicable, the order denying the special motion to strike must be affirmed. (*Physicians Com. for Responsible Medicine v. Tyson Foods, supra*, 119 Cal.App.4th at p. 128; *Metcalf v. U-Haul International, Inc., supra*, 118 Cal.App.4th at p. 1265; *Brenton v. Metabolife Internat., Inc., supra*, 116 Cal.App.4th at pp. 683, 689-691; see *Jewett v. Capital One Bank, supra*, 113 Cal.App.4th at p. 815, fn. 5.)

The order denying the special motion to strike is affirmed. Plaintiffs, CBSK Financial Group, Inc. doing business as American Home Loans, Lori Pendray, and Dori Kay, are to recover their costs on appeal from defendants, NovaStar Home Mortgage, Inc. and NovaStar Mortgage, Inc.

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TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.